We also include LECs that have non-equal-access switches in the general coverage of this waiver. We do not address in this order the special problems presented by non-equal-access switches that were raised in the USTA Petition.[7] We will be addressing in a separate order the issues raised by parties regarding the provision of payphone-specific coding digits by non-equal-access switches.

This waiver is effective immediately in order to ensure that all PSPs receive per-call compensation effective October 7, 1997, as required by the *Payphones Orders.*

This waiver is appropriate because special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[8] The special circumstances are that transmission of payphone-specific coding digits is not yet ready for implementation for certain payphones. The industry is, however, working on an expeditious resolution of this situation. The public interest is served by this waiver because it allows the Commission to move forward in implementing the statutory requirement[9] that PSPs receive fair compensation for calls placed from their payphones. Refusal to waive this requirement would lead to the inequitable result that many payphone providers, particularly independent providers who do not control the network modifications necessary to permit payphone-specific coding digits to be transmitted, would be denied any compensation while implementation issues are being resolved by the industry. This limited waiver, moreover, will not significantly harm any parties. The unavailability of these coding digits, for instance, will not preclude IXCs from identifying payphone calls for the purpose of determining the number of calls for which compensation is owned. Nor will the waiver interefere with the possibly sixty percent of payphones that currently are able to transmit payphone-specific coding digits.

Accordingly, pursuant to authority contained in sections 1, 4, 201–205, 218, 226, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 201–205, 218, 226, and 276, and §§ 0.91, 0.291 and 1.3 of the Commission's rules, 47 CFR 0.91, 0.291 and 1.3, *it is ordered* on the Commission's own motion that the time before payphone-specific coding digits are required for per-call compensation is extended until March 9, 1998, to the extent described herein.

It is further ordered that this order is effective upon release thereof, and that the waiver included in this order is effective October 7, 1997.

List of Subjects in 47 CFR Part 64

Communications common carriers, Operator service access, Payphone compensation, Telephone.

Federal Communications Commission.

A. Richard Metzger, Jr.,

Acting Chief, Common Carrier Bureau.

[FR Doc. 97–29305 Filed 11–5–97; 8:45 am]

BILLING CODE 6712–01–P

[7] USTA Petition at 9, 11.

[8] *WAIT Radio* v. *FCC,* 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[9] 47 U.S.C. 276(b)(A).

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 385

[FHWA Docket Nos. MC–94–22 and MC–96–18; FHWA–97–2252]

RIN 2125–AC 71

Safety Fitness Procedure; Safety Ratings

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This document incorporates a Safety Fitness Rating Methodology (SFRM) as an appendix to the Motor Carrier Safety Fitness Procedures regulations. The SFRM will be used to measure the safety fitness of motor carriers against the safety fitness standard contained in 49 CFR Part 385. By this action the FHWA will supersede the interim final rule promulgated on May 28, 1997, effective May 28, 1997 until November 28, 1997 (62 FR 28807). That rule incorporated an SFRM to calculate the safety fitness of motor carriers transporting hazardous materials in quantities for which vehicle placarding is required, or transporting 15 or more passengers including the driver. The rule also includes a procedure which provides a notice period of 45 days during which a proposed rating can be challenged before it becomes effective.

DATES: The effective date of this regulation is November 28,1997.

FOR FURTHER INFORMATION CONTACT: Mr. William C. Hill, Vehicle and Operations Division, Office of Motor Carrier Research and Standards, (202) 366–4009, or Mr. Charles Medalen, Office of the Chief Counsel, (202) 366–1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Introduction

The FHWA is taking this action largely in response to a finding of the District of Columbia Circuit Court of Appeals, *infra.* This final rule is required to meet the FHWA's responsibility to maintain a system to determine the safety fitness of motor carriers operating in interstate commerce, but the agency is considering other means to achieve that goal.

Some commenters to this docket argued that a performance-based system modeled on SafeStat would be fair, and perhaps preferable to the system proposed in the FHWA's May 28 NPRM, *infra,* but that improvements are needed in the generation and use of data.

The FHWA's goal is to create a more performance-based means of determining when carriers are not fit to conduct commercial motor vehicle (CMV) operations safely in interstate commerce. A future rating system using a pass-fail test is conceivable. The FHWA will publish an advanced notice of proposed rulemaking shortly in the **Federal Register** requesting comments and supporting data on the future of a rating system that can be used both in making safety fitness determinations and in meeting the demands of shippers, insurers and other present and potential users interested in evaluating motor carrier performance.

Background

The U.S. Court of Appeals for the District of Columbia Circuit ruled on March 19, 1997, that the FHWA's procedures for assigning safety ratings were adopted contrary to law. *MST Express and Truckers United for Safety* v. *Department of Transportation and Federal Highway Administration,* 108 F.3d 401 (D.C. Cir. 1997). The court found the FHWA had failed to carry out its statutory obligation to establish, by regulation, a means of determining whether a motor carrier has complied with the safety fitness requirements of the Motor Carrier Safety Act of 1984 (MCSA) (codified at 49 U.S.C. 31144) because the SFRM had not been adopted pursuant to notice and comment rulemaking, as 49 U.S.C. 31144(a) requires. The safety rating of MST Express was determined using the SFRM, and the petitioner's *conditional* safety rating was therefore vacated and the matter remanded to the FHWA ''for such further action as it may wish to take, consistent with the decision.''

In response to the court's decision the FHWA issued an interim final rule (62 FR 28807) effective May 28, 1997, adopting the challenged SFRM but only to rate motor carriers transporting hazardous materials or passengers pending the development of a permanent rule. This step was necessary in order to enable the agency to comply with the mandate of the MCSA of 1990 (49 U.S.C. 5113), which requires that passenger and hazardous materials carriers cease operations within 45 days of being rated *unsatisfactory*.

In a notice of proposed rulemaking (NPRM) (62 FR 28826), also published on May 28, 1997, the FHWA proposed to modify the SFRM, incorporate it as Appendix B to Part 385, and use it in the process of deciding whether all motor carriers meet the safety fitness requirements.

The FHWA had been using an SFRM, comprised of six rating factors, since October 1, 1989, as the mechanism for calculating how well motor carriers adhere to 49 CFR 385.5, Safety fitness standard. In addition to making the detailed explanation of the SFRM publicly available since August 16, 1991, the FHWA issued notices seeking comments from the public in FHWA Docket Nos. MC–91–8 and MC–94–22.

In the first docket, the FHWA solicited public comment on an interim final rule (56 FR 40801) (August 16, 1991) implementing the provision of the MCSA of 1990 prohibiting a motor carrier with an *unsatisfactory* safety rating from operating CMVs to transport: (1) Hazardous materials in quantities for which vehicle placarding is required, or (2) more than 15 passengers including the driver. This prohibition becomes effective after 45 days have elapsed following receipt of an *unsatisfactory* safety rating issued by the FHWA. During the 45-day period, the motor carrier should take such action as may be necessary to improve its safety rating to *conditional* or *satisfactory* or be subject to the prohibition. Fourteen comments were received in response to the 1991 interim final rule, and those which provided information relevant to the May 28, 1997, NPRM were discussed in that document.

In the second docket, initiated by a notice published in the **Federal Register** on September 14, 1994 (59 FR 47203), the FHWA requested comments on changes made to the SFRM in 1993. Additional changes to the SFRM, which were to become effective on October 1, 1994, were also explained and comments were invited. These changes initiated the use of violations of the safety regulations designated as ''acute'' or ''critical'' to rate each of the five regulatory factors evaluated when performing a compliance review (CR) at a carrier's place of business.

The FHWA also solicited comments concerning: (1) The direction that future modifications to the SFRM should take, and (2) how best to disseminate information to the industry about new regulations and the FHWA programs that encourage ''voluntary compliance.''

The 17 comments received in response to the second docket were discussed in the May 28, 1997, NPRM to the extent they provided relevant information.

On April 29, 1996, the FHWA proposed to reorganize and revise its procedural rules, including those related to the assignment of ratings (61 FR 18866). Among the revisions proposed was a procedure for the issuance of a notice of proposed rating which provided a 45-day period within which a motor carrier could challenge a proposed rating before it became effective. The procedure also provided relief from an adverse rating to carriers that were willing to make credible, effective and verifiable commitments to improved management and performance.

Discussion of Comments

Thirty two comments were received in response to the May 28, 1997, interim final rule (62 FR 28807) and NPRM (62 FR 28826). Only a few of the 125 comments received in response to the April 29, 1996 NPRM on procedural rules addressed the notice of proposed rating provision.

Purpose of Safety Ratings

The Transportation Lawyers Association (TLA) suggested that the FHWA undertake a thorough evaluation of its entire program by first recognizing that the current rating system serves two purposes, information (i.e., the rating) and enforcement. It recommended the FHWA separate the rating from enforcement as it believes that combining them is unworkable.

The American Trucking Associations (ATA) stated that the current SFRM is based on the premise that a lack of ''safety management controls'' is indicative of an unsafe carrier, yet it does not believe the FHWA has demonstrated that a lack of compliance will cause a carrier to be unsafe.

The safety rating provides information, both to the rated carrier and anyone else inquiring about the rating, concerning the degree of adherence by the motor carrier to the Part 385 safety fitness standard. Enforcement is an aspect of the rating only in the sense that a motor carrier with an *unsatisfactory* rating is prohibited from transporting hazardous materials requiring placarding or 15 or more passengers including the driver. Congress, however, mandated this result by enacting the prohibition against transportation by such carriers in the MCSA of 1990. The FHWA, moreover, believes that sufficient data exists to conclude that motor carriers with inadequate safety management controls, i.e., less than *satisfactory* compliance with the safety fitness standard, are more likely to have higher accident rates. In addition, the FHWA has commissioned research by the Volpe National Transportation Systems Center, part of the Research and Special Programs Administration, to assess the performance of the CR program through the development of an Impact Assessment Model. Preliminary indications are that CR activity, due to its educational, safety awareness and sanction aspects, has substantial crash reduction benefits.

Accident Factor

The National Tank Truck Carriers (NTTC), Rocor Transportation (RT), Truckload Carriers Association (TCA), American Movers Conference (AMC), the ATA, Oregon Department of Transportation, Motor Carrier Transportation Branch (ODOT/MCTB), and Ryder System, Inc. (RS) supported the proposal to adopt a recordable accident rate for the accident factor of the SFRM. The Advocates for Highway and Auto Safety (AHAS) questioned the statement in the NPRM that ''The data indicate that the vast majority of all accidents have been determined to be preventable.''

Santee Carriers (SC) , Vertex Chemical Corporation (VC), and the Owner Operator Independent Drivers Association, Inc. (OOIDA) wanted to retain the recordable preventable accident criteria for the accident factor, as this would measure accidents within the carrier's control, and OOIDA would like the ''preventability'' determination made more objective. The TCA stated that the FHWA has yet to define the criteria to be used in determining preventability.

The Association of Waste Hazardous Materials Transporters (AWHMT), Distribution & LTL Carrier Association (DLCA), the VC, Petroleum Marketers Association of America (PMAA) and the ATA recommended determining accident rates on a multi-year basis. They believe a multi-year standard is more reflective of the average accident rate. The TCA and the NPTC recommended that there be a midpoint between accident rates of 1.6 and 2.1 to

define an *unsatisfactory* rating in the accident factor for carriers with some specified significant portion, though not all, of their mileage in urban areas.

The TCA, the AMC, Agricultural Transporters Conference (ATC), California Highway Patrol (CHP) and the RS recommended adopting different accident rates for particular industry segments and types of operations. The PMAA believes that the proposed 2.1 accident rate is unfair for its short haul carriers because most of their mileage occurs in heavy traffic environments. A similar concern was expressed by the VC and the OOIDA.

The RI and the NPTC opposed removing the *conditional* level in the accident factor rating. The AHAS opposed a single tier rating for the accident factor as motor carriers not assigned an *unsatisfactory* factor rating could not be distinguished from unrated carriers. They also opposed continuation of the exception for carriers with less than 20 drivers (these carriers could not be rated less than *conditional* for the accident factor) as they believe some of these carriers could have very high accident rates.

The DLCA, the TCA, the AWMT, the VC, the NADA, the ATA, New Mexico Motor Carrier's Association (NMMCA), and the CHP wanted the FHWA to use only ''at fault'' accidents, those determined by law enforcement officers to be the fault of the CMV driver or those otherwise clearly attributable to the fault of the CMV driver or carrier, for rating the accident factor.

The NPTC, the ATA and the AHAS questioned whether doubling the national average is appropriate, as poor mileage information undermines accurate calculation of accident rates. The NPTC stated that the FHWA presented no statistical data for doubling the accident rate, and that a more appropriate reference would be the median accident rate.

The FHWA has carefully considered all of the comments and for the following reasons believes it is reasonable to use the recordable accident rate for evaluating the accident factor. The data from Fiscal Years 1994, 1995 and 1996 in Recordable Rate (RR) and Recordable Preventable Rate (RPR) is as follows: 1994: RR=.804; RPR=.553; 1995: RR=.724; RPR=.528; 1996: RR=.713; RPR=.503. The FHWA has increasingly focused CRs on carriers most likely to have accidents, thus, the rates for reviewed carriers are higher than the rates would be for all carriers subject to the Federal Motor Carrier Safety Regulations (FMCSRs). The recordable accident rates used were taken from all CRs performed in Fiscal Years 1994, 1995 and 1996, which addresses the concern that the average accident rate should be on a multi-year basis. The average recordable rate was .747, and the average recordable rate for carriers operating entirely within a 100 air mile radius was .839 per million miles. Recent analysis of accident rates for all carriers showed only small differences in rates by fleet size, and the differential between recordable and recordable preventable accidents was consistent by fleet size. The FHWA will rate the accident factor only when a carrier has two or more accidents in the 12 months prior to the CR. A single accident could easily place a small carrier, or a larger carrier operating very few miles, over the threshold for the *unsatisfactory* factor rating, which is not a reliable outcome. By using only the *unsatisfactory* rating the FHWA believes it is sending a message that any accident is unacceptable; however, only those carriers that are over the threshold will be identified in the factor rating. A motor carrier with an accident rate twice the average rate for all similarly situated carriers is most likely to have inadequate or improperly functioning safety management controls.

An urban carrier (a carrier operating entirely within the 100 air mile radius) with a recordable accident rate over 1.7 (approximately twice the 1994–96 average of .839) will receive an *unsatisfactory* factor rating. All other carriers with a recordable accident rate greater than 1.5 (approximately double the 1994–96 average of .747) will receive an *unsatisfactory* factor rating.

The FHWA stated in the NPRM, ''If a driver, who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.'' The FHWA reviewed the data relative to the statement in the NPRM that ''the *vast* majority of all accidents have been determined to be preventable.'' The statement should have said simply that the *majority* of all accidents are preventable, as approximately two thirds of recordable accidents are preventable.

The SFRM is the means by which the FHWA calculates a motor carrier's adherence to the § 385.5 safety fitness standard. As it is a method and not an absolute criterion, the FHWA will continue to consider non-preventability of accidents when a motor carrier contests a rating by presenting compelling evidence that the recordable rate, as applied to its particular circumstances, is not a fair means of evaluating its accident factor. An example would be a motor carrier that had two recordable accidents in the 12 months prior to the CR and in both accidents its' CMVs were rear-ended when stopped for a signal light. The FHWA believes there will be relatively few instances where a motor carrier will be able to avail itself of the non-preventability defense to an adverse rating based on the accident factor. Retaining the non-preventability exception provides motor carriers the ability to present information that their accident factor should undergo a second-level evaluation. Adopting the 45-day notice of proposed rating procedure will allow for such second-level review in a meaningful manner.

The FHWA is continuing to evaluate the possibility of setting different accident-rate thresholds for different types of transportation, extending the urban carrier threshold to carriers that are not exclusively urban, and establishing a different threshold for an *unsatisfactory* accident factor rating for carriers with very few accidents, as opposed to those with many accidents. No such changes are included in this final rule, however.

The FHWA will continue to examine the accident data in the Motor Carrier Management Information System (MCMIS) as a means to evaluate all carriers' accident rates. This source of information is increasingly reliable. The states and their subdivisions have uploaded their accident data more timely and accurately with each year since the National Governors Association accident reporting system was inaugurated in 1992.

Objectivity of Ratings

The DLCA and the ATA argued that there is too much variance by regions in the rating process. Further, the ATA stated that CRs must be performed uniformly throughout the country, and the ''findings of the CR must accurately reflect the overall safety posture of the motor carrier.'' It also commented that ''the CR and rating processes should not be overly influenced by the attitude of individual investigators and the results should not be different depending on a motor carrier's geographical location.''

The FHWA believes that, having modified the SFRM to rate motor carriers on the basis of actual violations of ''acute'' regulations and patterns of violations of ''critical'' regulations and to measure performance by recordable accidents and vehicle out-of-service (OOS) rates from roadside driver/vehicle inspections, the safety rating process has been made more objective. The regulations identified as ''acute''

and ''critical'' enable the motor carriers with adequate safety management controls to direct their initial compliance efforts toward these regulations. There should not be a pattern, i.e., a 10 percent violation rate, of 'critical' regulations by motor carriers exercising due diligence in their efforts to comply with the regulations. The FHWA continues to work toward making the CR process as fair and as uniform as possible. The agency believes that an important aspect of national uniformity in the performance of CRs is the review of a relatively constant number of vehicles, drivers, and records which varies with the number of vehicles and drivers performing transportation for the carrier. The minimum number of vehicles, drivers, and records to review is derived from a sampling chart, which provides guidance to the individual performing the CR. It is relevant that motor carriers are required to comply with all applicable FMCSRs and Hazardous Materials Regulations (HMRs). Thus, to perform a CR based on a random sample of a carrier's drivers, vehicles and records would be counter-productive in determining if the carrier was complying with regulatory requirements and meeting the Safety fitness standard in § 385.5.

''Acute'' and ''Critical'' Regulations

The AHAS and the AWHMT believe that the FHWA has not explained why regulations are categorized as ''acute'' or ''critical.'' The AWHMT questioned the designation of certain regulations as ''critical'' and argued that they should be ''acute'' regulations. The AWHMT also wanted to know the FHWA's rationale for the ''10 percent threshold when assessing points to carriers for a pattern of violations of a ''critical'' regulation,'' and also asked what is meant by ''large numbers'' concerning the pattern of violations when ''critical'' regulations were discussed. The AHAS is concerned with FHWA's comment that ''even a carrier with effective safety management controls will likely violate some of the 'critical' regulations.'' The AHAS also wanted violations of ''acute'' regulations to be cited even when the motor carrier did not have knowledge or could not reasonably be expected to have knowledge of the violation.

The FHWA has categorized certain regulations as ''acute'' or ''critical'' based on the experience of the Federal field staff and State enforcement officials. As the terms imply, such regulations have a potential or actual impact on operational safety, and a carrier's compliance with them is a direct indication of its ability effectively to manage the complex operations needed to make it a responsible user of the public highways. The FHWA believes that even motor carriers with effective safety management controls may incur some violations of ''critical'' regulations, notwithstanding systematic review of their compliance with the regulations. This is so because of the necessity for remote and often post hoc monitoring by a safety manager. A motor carrier that reviews drivers records of duty status (RODS) and discovers three instances out of 100 RODS reviewed where drivers exceeded the 10-hour driving limitation in § 395.3(a)(1), may take appropriate actions to discipline the drivers, but the violations have still occurred. The carrier is not in total compliance, but the 97 instances where compliance was found indicates the carrier's safety management controls are effective. A violation rate over the ''10 percent threshold'' is used as an indication that a pattern of noncompliance is detectable and tolerated.

The FHWA has reviewed the reference in the SFRM to ''large numbers of documents'' found in (62 FR 28832). The agency was attempting to convey the principle that a pattern of violations is more than an isolated instance of noncompliance. There was no intent to imply a specific number of documents. To clarify its intent the sentence now reads: ''When a number of documents are reviewed, the number of violations required to meet a pattern is equal to at least 10 percent of those examined.'' The preceding sentence remains ''A pattern is more than one violation.'' Concerning the AHAS recommendation that the FHWA should cite the carrier for all violations of ''acute '' regulations, the FHWA believes its proposed policy was and is correct. Violations of ''acute'' regulations will not be cited on the CR or used in the SFRM if, under the circumstances, the carrier did not know, and could not reasonably be expected to have known, of a violation that the driver deliberately concealed from the carrier. Because of the nature of ''acute'' regulations, however, such omissions are expected to be rare.

Vehicle Factor

The AWHMT wanted to know if the FHWA plans to adjust the 34 percent OOS rate for the vehicle factor. The NTTC, the TCA and the AMC recommended that the FHWA consider not assigning any weight to OOS violations in the vehicle factor until the NTTC's petition to incorporate into the FMCSRs the current OOS criteria published by the Commercial Vehicle Safety Alliance and maintained in concert with the FHWA, is finally disposed of. One association noted that good roadside inspections are often not documented. Rocor Transportation found the current criteria for the vehicle factor acceptable.

The FHWA will continue to rate the vehicle factor as proposed in the NPRM as it believes this is an appropriately objective way to evaluate the carrier's performance. Whether the OOS criteria should be incorporated into the FMCSRs is an issue unrelated to the validity of those criteria as a measure of vehicle safety. The OOS criteria are essentially enforcement tolerances, as § 396.3(a)(1) requires that parts and accessories be in safe and proper operating condition at all times.

The 34 percent OOS rate is the first indicator in evaluating the vehicle factor when a motor carrier has three or more roadside inspections in the 12 months prior to the review, or three vehicles inspected at the time of the CR, or a combination of the two. If the OOS rate is 34 percent or greater, the initial factor rating is conditional. The reason for the three inspections is that the agency wanted the vehicle OOS rates to be an aspect of the factor rating for as many carriers as possible, but did not want one OOS vehicle inspection to impact the factor rating. The vehicle OOS rate for Level I (full) inspections has been between 27.9 percent and 36.2 percent for the last five fiscal years. Generally, roadside inspections are not random. Vehicles that appear to have defects are sometimes selected from the traffic stream at scales, or vehicles of carriers that have no or few inspections in the MCMIS are selected for inspection. Therefore, the average OOS rate based on selected sampling is approximately one-third of the vehicles inspected. The FHWA believes setting the rate at 34 per cent for the initial factor rating of conditional is appropriate, as a carrier with only one vehicle out of three inspected placed OOS will not have the factor rating affected. The FHWA is aware that some vehicles receive a cursory inspection at a scale facility, which does not produce an inspection report when no defects are discovered. The FHWA will consider adjusting the 34 percent first indicator should there be a significant change in the Level I vehicle OOS rate.

The second indicator in the vehicle factor is the compliance with the Part 396 regulatory requirements. If noncompliance with an ''acute'' regulation or a pattern of noncompliance with a ''critical'' regulation is discovered, the initial

conditional factor rating will be lowered to unsatisfactory.

For carriers with fewer than three inspections in the 12 months prior to the CR, or three vehicles inspected at the time of the review, or a combination of the two totaling three, the vehicle factor will be evaluated on the basis of compliance with ''acute'' and ''critical'' regulations. This is the same method for evaluating the other regulatory factors.

Selection of Records for Review

A number of the commenters reiterated that the FHWA should sample records randomly for safety rating purposes, although they agreed that targeted selection of records is appropriate for enforcement purposes. They cited studies of the way the FHWA selects records for CRs, and concluded that the selection method ''does not yield a representative picture of the state of the carrier's safety record.'' They suggest that for rating purposes the information should be generated by a review in which motor carrier records would be examined on a purely random basis, according to generally accepted statistical practices, in order to present a fair picture of the carrier's safety compliance in a broad context. One commenter believes this will remove some of the alleged subjectivity from the current system. Another commenter suggests the FHWA go beyond a random sample requirement for CRs and give the carrier the option of substituting a 100 percent universal sample, probably in the form of electronic records.

One commenter quoted a recent memorandum from OMC's Office of Field Operations to the Regional Directors which indicates that ''all references to the 'International Standard of Sampling' have been removed from the *Field Operations Manual*.'' The commenter's concern was that this action ''is inconsistent with both the interim final rule and the notice of proposed rulemaking,'' which indicated that the FHWA currently uses and proposes this standard.

The International Brotherhood of Teamsters (IBT) noted that the May 28,1997, NPRM did address the sampling issues, and it found the reasons supporting the current sampling methodology persuasive. The IBT also stated that the proper objective is to focus scarce enforcement resources where the problems are most likely to occur.

The FHWA has carefully considered these comments and believes it is in the best interest of public safety to continue to focus its limited resources on drivers and vehicles most likely to be in violation of the regulations. The overall safety posture of the motor carrier is not being measured during the CR, rather the ''adequacy of the carrier's safety management controls'' is being assessed pursuant to § 385.5. The references to the International Standard of Sampling have been removed from the *Field Operations Training Manual*, as the FHWA is making it very clear that the sampling chart, which has not been changed, is intended only for purposes of determining the minimum number of records to be reviewed, depending on the size of the carrier. The agency does not want to give the false impression that full-scale random sampling procedures are being used. Motor carriers are equally able to use the same indicators the FHWA uses when the carriers are monitoring the performance of their drivers and vehicles to assure compliance with the FMCSRs and HMRs. It is important to note that a *satisfactory* safety rating is only a passing grade and that full compliance with all of the safety regulations should be the objective of every carrier and every driver. It is also the best way to avoid a rating with adverse consequences to the carrier's operations.

Opportunity To Challenge a Rating

A registered practitioner and regulatory analyst recommended that there should be a procedure to enable a motor carrier that challenges a safety rating to obtain a stay of the effectiveness of that rating until the challenge has been heard and decided. The TLA recommended that the carrier have a means of correcting inaccurate information before the safety rating is issued. These recommendations are consistent with proposals made in response to the April 29,1996, NPRM to amend the FHWA's rules of practice for motor carrier proceedings. The NPRM proposed that motor carriers receive a ''Notice of Proposed Rating'' before a safety rating was issued (61 FR 18866,18884). The comments overwhelmingly supported that proposal.

One State enforcement agency argued that, ''in the interest of the traveling public,'' the 45-day grace period for passenger and hazardous material carriers that receive an *unsatisfactory* safety rating should be waived and the rating should become effective immediately. The MCSA of 1990 requires that motor carriers be afforded 45 days after receipt of an *unsatisfactory* safety rating before the prohibition against transportation becomes effective. The National Automobile Dealers Association (NADA) was satisfied that carriers are afforded reasonable due process. The AHAS strenuously opposed the suppression of the rating results during the 45-day challenge period, which, of course, would defeat the purpose of the provision, i.e., to afford the opportunity to be heard before a potentially damaging judgment is rendered.

The FHWA has considered these comments and is amending § 385.11, Notification of a safety rating, to incorporate a notice-of-rating procedure for all less than satisfactory ratings. A proposed safety rating of unsatisfactory or conditional will become the final rating 45 days after the date the notice of proposed safety rating is received by the motor carrier, unless the carrier petitions for a review and the petition is granted. The proposed-rating procedure parallels the requirement in the MCSA of 1990 that a motor carrier receiving an unsatisfactory safety rating be given 45 days to improve its rating before the ban on the transportation of hazardous materials and passengers takes effect. It eliminates a distinction between carriers based on type of operation by giving advance notice of the proposed adverse rating in all cases. This will afford all carriers the opportunity to be heard during that period before consequences attach. This provision was published for notice and comment on April 29, 1996 (61 FR 18866, 18884) and was welcomed by virtually all of those who commented on it. Under the circumstances, the agency believes that a supplemental notice of proposed rulemaking to republish the proposal under this docket would be superfluous and is therefore unnecessary under the Administrative Procedure Act.

As a result of amending § 385.11, related sections in Part 385 were also revised to incorporate those changes.

Point Assessment for Violations of ''Acute'' and ''Critical'' Regulations

One commenter wanted all of the factor 3 (Hours of Service) ''critical' regulations to be aggregated to meet the 10 percent pattern definition when violations are discovered. For example, violations of the 10-hour rule and the 70-hour rule would be treated as part of the same pattern. Another commenter agreed with the higher weighting of patterns of factor 3 ''critical'' regulations. Another commenter stated that the motor carrier should not be penalized for willful hours of service violations by its drivers.

A number of commenters argued that patterns of violations of ''critical'' hours of service regulations should not be assessed two points, as they did not believe existing research establishes a causal relationship between those

violations and accidents. Another commenter stated that the current policy of two points for hours of service violations is one of ''absolute liability for hours of service violations'' and is irrational.

The ODOT/MCTB stated that although ''recent studies indicate time of day and the amount and quality of rest may be more critical factors than driving hours, and we are still obligated to enforce the current regulation to ensure an optimum level of performance.'' The commenter does not believe that doubling the points for factor 3 is appropriate unless there is a violation of cumulative on-duty time and falsification of records for the purpose of concealing excessive on-duty time. The ATA noted that several fatigue related studies which were placed in the docket as supplemental information, show that there is no simple way to measure fatigue. This is further evidence, the ATA wrote, that the connection between hours of service violations, fatigue and accidents is extremely complex and not fully understood. Thus, the ATA believes it would be inappropriate to give twice the weight to hours of service violations. The IBT agreed with the FHWA's proposal to retain a higher weighting factor for violations of Part 395 ''critical'' regulations.

After careful consideration of the comments, the FHWA remains convinced that the current regulations do have an impact in preventing the risks of driver fatigue and that they must be enforced until new regulations are developed. There have not been any studies that have discounted time on task as a significant contributor to fatigue. The observations of the ODOT/MCTB and the ATA about the complexity of the connection between hours of service violations, fatigue, and accidents, do not provide a rational basis for rulemaking changes. Moreover, there are no ''acute'' regulations in Part 395 (Hours of Service). Thus, to have a rating of less than satisfactory in factor 3, a motor carrier must have demonstrated a pattern of noncompliance with a ''critical'' regulation. The FHWA believes that motor carriers with effective safety management controls should be able to maintain a noncompliance rate of less than 10 percent for any of the Part 395 ''critical'' regulations. Therefore, until the ongoing rulemaking efforts to better regulate fatigue are concluded, the FHWA believes it is important to continue to assign two points for a pattern of violations of a Part 395 ''critical'' regulation.

Rating Factors

One commenter suggested that the accident factor have more weight than the other factors. Another commenter believes that until research is conclusive that one factor has a more significant impact on safety compared to the others, equal weight should be given to each factor. This difference in the commenters' responses is indicative of the problem the FHWA faces. While an accident is unquestionably a more serious event than any particular regulatory violation, there is good reason to believe that regulatory violations are causally related to accidents. The 1988 workgroup which developed the six factors in the SFRM was unable to determine that any of the six factors was more important to safety fitness than any other, and each factor was therefore given equal weight. (Although the Operations factor includes a double-weighting of patterns of violations of Part 395 ''critical'' regulations, a pattern requires that at least ten percent of the records of duty reviewed be in violation. During virtually all CRs a minimum of at least one hundred fifty RODS are reviewed for compliance with Part 395 ''critical'' regulations. Carriers with adequate safety management controls will be able to keep the rate of noncompliance under ten percent for any of these ''critical'' regulations. The only regulatory control on fatigue is the current hours of service requirements. The fact that a ''pattern'' of violations cannot occur unless at least ten percent of the RODS checked fail to comply with the regulations; that Part 395 includes no ''acute'' regulations; and that at least 150 RODS are typically reviewed, virtually eliminating the possibility of statistical accidents—all of these tend to balance the double weighting of patterns of violations of Part 395, resulting in a factor with roughly the same weight as any other. In the absence of clear evidence that one or more of the rating factors has a greater impact on safety or is a better index of the carrier's safety management controls, the FHWA has concluded that it must continue to place equal weight on each of the factors.

Safety Profiles

A number of the commenters were concerned about the accuracy of the information in the carrier profiles. Two commenters wanted the carrier to be presented in advance of the CR with ''a record of violations upon which an auditor intends to rely, so that the carrier has an opportunity to protect and defend its record and identify any inaccuracies before its safety performance is judged.'' They also were concerned about the timeliness of the data and wanted stale violations removed from the carrier's record. Two commenters suggested that carriers be provided a continuing opportunity to challenge the accuracy of the entries in their carrier profiles, and a process to correct the profiles when errors are discovered. They stated that it is ''virtually impossible to get a profile corrected under the current system.''

Motor carriers have access to their carrier profiles in the MCMIS, thus, there is little justification for presenting motor carriers in advance of the CR with the information in their carrier profile. The FHWA has consistently recommended that when errors from a State source are discovered in a motor carrier's safety profile, they should be brought to the attention of the State that performed the inspection or entered invalid or incorrect information into Safetynet. The FHWA is aware of only several instances where a State, when apprised of an error by a motor carrier, was unable or unwilling to correct the error. If motor carriers are unable to resolve the discrepancy with the State, they should contact the OMC Office of Motor Carrier Information Analysis (telephone (202) 366–4039). This office will work with the State, or if appropriate, correct the error in the safety profile on its own initiative. The FHWA continues to work with its State partners to improve the quality of the data in motor carrier safety profiles.

Implementation of Proposed SFRM

A number of the commenters opposed the implementation of the proposed SFRM, which they viewed as a ministerial task to comply with the findings of the Court in the *MST Express case.* Several of these commenters referred to the June 18, 1997, Motor Carrier Safety Audit and Rating Forum sponsored by the ATA, which they stated was held to build a consensus on the future of the safety rating process. It concluded that the current system must be replaced with a fairer, more uniform performance-based system.

The ATA wanted the ''new era'' concept of safety performance to be based less on regulatory compliance and more on ''performance measurements,'' e.g., accident rates, driver and vehicle OOS rates, driver traffic convictions, and violations of OOS orders. Other commenters agreed.

The ODOT/MCTB commented that, ''as proposed, the MCSFR [motor carrier safety fitness rating] methodology represents the best collection of safety information for a motor carrier currently

available.'' It stated that ''the fact that only 'acute' and 'critical' regulations affect the safety rating adds further credibility to the safety rating process. It is Oregon's opinion that the dreaded 'paper work' violations are not included in either the 'acute' or 'critical' regulations.'' The IBT also recommended that the FHWA adopt the SFRM as proposed.

The FHWA believes that the proposed SFRM establishes a fair and reasonable procedure to decide the safety fitness of owners and operators of CMVs. It also meets the statutory mandate (49 U.S.C. 31144) because it includes:

(a) specific, initial and continuing requirements to be met by the owners, operators, and other persons to prove safety fitness;

(b) a means of deciding whether the owners, operators, and other persons meet the safety fitness requirements in (a); and

(c) specific time deadlines for action by the FHWA in making fitness determinations.

Miscellaneous

Several sections in Part 385 are amended to correct previous technical errors. The definition of ''Safety review'' in § 385.3 is removed since Safety Reviews were discontinued as of October 1, 1994. The definitions of *Conditional safety rating* and *Unsatisfactory safety rating* in § 385.3 are revised to include references to § 385.5 (i) through (k), dealing with hazardous materials and accidents. These subsections were inadvertently omitted when the final rule was published on December 19, 1988 (53 FR 50961). Section 385.9 is revised to include a subsection (b) to meet the requirement in 49 U.S.C. 31144(a)(1)(C) that there be specific time deadlines for action by the Secretary in making fitness decisions.

Section 385.17 is revised in a number of ways. The FHWA published a proposed revision of § 385.17 for notice and comment under FHWA Docket No. MC–96–18 on April 29, 1996 (61 FR 18866, 18884), where it was designated as § 362.107. In addition to explaining more clearly the process to request a safety rating change based on corrective actions taken, that provision would have given carriers whose request was denied new rights to administrative review. Commenters favored this change almost unanimously. In order to make these rights available to motor carriers as soon as possible, the proposed provision designated as § 362.107 in the April 29 NPRM has been incorporated into this final rule, with minor changes, as § 385.17. Many parties concerned about the safety rating system submitted comments in response to the April 29, 1996, NPRM and the May 28, 1997, NPRM that opened this docket. Because the amended version of § 385.17 has already been published for notice and comment, though under a different docket and with a different section number, the FHWA finds good cause (pursuant to 5 U.S.C. 553(b)(B)) to adopt § 385.17, and the related amendments to §§ 385.11, and 385.15, which were also published in the April 29 NPRM, without re-publishing them under this docket as a Supplemental NPRM.

The current appendix to Part 385 is redesignated as appendix A. The Explanation of Safety Rating Process is added as appendix B. Changes to appendix B from the appendix in the NPRM are a result of using several years accident rates instead of one year for the accident rates in the accident rating factor, and editorial changes for clarity. Appendix B is further changed by substituting ''proposed rating'' for ''anticipated rating'', to conform with the procedure in § 385.11(b).

Rulemaking Analyses and Notices

For the reasons given below, the FHWA finds good cause to make this final rule effective less than 30 days after the date of publication. The interim final rule adopting a Safety Fitness Rating Methodology (SFRM) was promulgated on May 28, 1997 (62 FR 22807), and will expire on November 28, 1997. That rule allows the FHWA to assign safety ratings to motor carriers which use CMVs to transport 15 or more passengers, including the driver, or hazardous materials in quantities that require placarding under DOT regulations. The final rule published today does not change the existing motor carrier safety requirements or impose new obligations on motor carriers. It merely sets forth an SFRM the FHWA will use to evaluate motor carriers' compliance with the standards and factors specified in 49 C.F.R. 385.5 and 385.7. Furthermore, it gives carriers 45 days after notification of a proposed *conditional* or *unsatisfactory* rating before the rating takes effect. During that time, motor carriers will have an opportunity to correct deficiencies in their compliance with Part 385 or to point out to the agency any material factual issues in dispute. No such grace period is available under the current interim final rule. Carriers rated less than *satisfactory* under the SFRM will therefore have at least 45 days after the effective date of this rule before the rating takes effect. In view of these facts, and because the demands of public safety and a specific statutory mandate (49 U.S.C. 5113) require the agency to continue rating passenger and hazardous materials carriers without interruption, the FHWA hereby finds good cause pursuant to 5 U.S.C. 553(d)(3) to make this rule effective on November 28, 1997.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866. No serious inconsistency or interference with another agency's actions or plans is likely to result, and it is unlikely that this regulatory action will have an annual effect on the economy of $100 million or more. This final rule is administrative in nature in that it neither imposes new requirements upon the motor carrier industry nor alters the August 16, 1991, interim final rule implementing the provisions of 49 U.S.C. 5113. The FHWA does not anticipate any new economic impacts as a result of this rulemaking. This rule would not impose any costs on motor carriers in addition to those assessed in the Regulatory Evaluation and Regulatory Flexibility Analysis prepared in support of the 1988 final rule. (The 1991 interim final amended the 1988 rule in ways that the FHWA believes had minimal economic impact on motor carriers.)

The existing rating factors are used to evaluate the degree to which the motor carrier complies with the regulations and add no costs because the carrier is already required to comply. Compliance with regulations, however, is only a surrogate for actual safety performance. The addition of the accident factor introduces a direct measure of performance into the equation. In 1988, this factor was not considered as having a cost consequence because the effect of a negative rating resulting from substantially higher accidents than the norm would be virtually identical to the impact on the carrier's business that would flow from public knowledge of its poor safety performance.

The impact resulting from a negative rating generally relates to knowledge of the rating by shipper or insurer. If those same entities know of the unusually high accident rate, the FHWA believes the consequences would or should be approximately the same.

Considering all recordable accidents instead of only preventable recordable accidents will have the same sort of impact. Nevertheless, the FHWA believes that this is a significant regulatory action within the meaning of the Department of Transportation's

regulatory policies and procedures because there is significant public interest in this action.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities and has determined that it will not have a significant economic impact on a substantial number of small entities. The motor carriers economically impacted by this rulemaking will be those who are rated as *unsatisfactory* and fail to take appropriate actions to have their rating upgraded. In the past, relatively few small motor carriers had been affected by the statutory consequences of an *unsatisfactory*, and there is no reason to believe that those impacts will increase in any way by this action.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. These safety requirements do not directly preempt any State law or regulation, and no additional costs or burdens would be imposed on the States as a result of this action.

Furthermore, the State's ability to discharge traditional State governmental functions would not be affected by this rulemaking.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

National Environmental Policy Act

The agency has analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 385

Highway safety, Highways and roads, Motor carriers, Motor vehicle safety, and Safety fitness procedures.

Issued on: October 31, 1997.

Gloria Jeff,

Acting Administrator.

In consideration of the foregoing, the FHWA is amending title 49, Code of Federal Regulations, Chapter III, Part 385 as set forth below:

PART 385—SAFETY FITNESS PROCEDURES

1. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 104, 504, 521(b)(5)(A), 5113, 31136, 31144, and 31502; 49 CFR 1.48.

2. In § 385.3, under the definition ''reviews'', remove and reserve paragraph (2) ''safety review''; and under the definition ''safety ratings'', revise paragraphs (2) ''conditional safety rating'' and (3) ''unsatisfactory safety rating'' to read as follows:

§ 385.3 Definitions.

* * * * *

Reviews. * * *

(1) * * *

(2) [Reserved]

(3) * * *

Safety ratings: (1) * * *

(2) *Conditional safety rating* means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard that could result in occurrences listed in § 385.5 (a) through (k).

(3) *Unsatisfactory safety rating* means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard which has resulted in occurrences listed in § 385.5 (a) through (k).

* * * * *

3. Section 385.9 is revised to read as follows:

§ 385.9 Determination of a safety rating.

(a) Following a compliance review of a motor carrier operation, the FHWA, using the factors prescribed in § 385.7 as computed under the Safety Fitness Rating Methodology set forth in appendix B of this part, shall determine whether the present operations of the motor carrier are consistent with the safety fitness standard set forth in § 385.5, and assign a safety rating accordingly.

(b) Unless otherwise specifically provided in this part, a safety rating will be issued to a motor carrier within 30 days following the completion of a compliance review.

4. Section 385.11 is revised to read as follows:

§ 385.11 Notification of a safety rating.

(a) Except as provided elsewhere in this section, written notification of the safety rating will be provided to a motor carrier as soon as practicable after assignment of the rating, but not later than 30 days after the review that produced the rating.

(b) Before a safety rating of *unsatisfactory* or *conditional*, is assigned to any motor carrier, the FHWA will issue a notice of proposed safety rating. The notice of proposed safety rating will list the deficiencies discovered during the review of the motor carrier's operations, for which corrective actions must be taken. A proposed *conditional* safety rating (which is an improvement of an existing *unsatisfactory* safety rating) becomes effective as soon as it issued from Washington, D.C., and the carrier may also avail itself of relief under the § 385.15, Administrative Review and § 385.17, Change to safety rating based on corrective actions.

(c) A notice of a proposed safety rating of *unsatisfactory* will indicate that, if the *unsatisfactory* rating becomes final, the motor carrier will be subject to the provisions of § 385.13, which prohibit motor carriers rated *unsatisfactory* from transporting hazardous materials or passengers, and other consequences that may result from such rating.

(d) Except as provided in § 385.17, a proposed safety rating issued pursuant to paragraph (b) of this section will become the motor carrier's final safety rating 45 days after the date the notice of proposed safety rating is received by the motor carrier.

5. Section 385.13 is revised to read as follows:

§ 385.13 Unsatisfactory rated motor carriers—prohibition on transportation of hazardous materials and passengers; ineligibility for Federal contracts.

(a) A motor carrier rated *unsatisfactory* is prohibited from operating a commercial motor vehicle to transport—

(1) Hazardous materials for which vehicle placarding is required pursuant to part 172 of chapter 1 of this title; or

(2) More than 15 passengers, including the driver.

(b) A motor carrier subject to the provisions of paragraph (a) of this section is ineligible to contract or subcontract with any Federal agency for transportation of the property or passengers referred to in paragraphs (a)(1) and (a)(2) of this section.

(c) *Penalties.* When a carrier subject to the prohibitions in paragraph (a) of this section is known to transport the property or passengers referred to therein, an order will be issued placing those operations out of service. Any motor carrier that operates commercial motor vehicles in violation of this section will be subject to the penalty provisions listed in part 386 of this chapter.

6. Section 385.15 is revised to read as follows:

§ 385.15 Administrative review.

(a) Within the 45 day notice period provided in § 385.11(d), or within 45 days after denial of a request for a change in rating as provided in § 385.17(g), the motor carrier may petition the FHWA for administrative review of a proposed or final safety rating by submitting a written request to the Director, Office of Motor Carrier Field Operations, 400 Seventh Street, SW., Washington DC 20590.

(b) The petition must state why the proposed safety rating is believed to be in error and list all factual and procedural issues in dispute. The petition may be accompanied by any information or documents the motor carrier is relying upon as the basis for its petition.

(c) The Director, Office of Motor Carrier Field Operations, may request the petitioner to submit additional data and attend a conference to discuss the safety rating. Failure to provide the information requested or attend the conference may result in dismissal of the petition.

(d) The petitioner shall be notified in writing of the decision on administrative review. The notification will occur within 30 days after receipt of a petition from a hazardous materials or passenger motor carrier.

(e) If the decision on administrative review results in a final rating of *unsatisfactory* for a hazardous materials or passenger motor carrier, the decision shall be accompanied by an appropriate out-of-service order.

(f) All other decisions on administrative review of ratings constitute final agency action. Thereafter, improvement in the rating may be obtained under § 385.17 of this part.

7. Section 385.17 is revised to read as follows:

§ 385.17 Change to safety rating based on corrective actions.

(a) Within the 45-day period specified in § 385.11(d), or at any time after a rating has become final, a motor carrier may request a change to a proposed or final safety rating based on evidence that corrective actions have been taken and that its operations currently meet the safety standard and factors specified in § 385.9.

(b) A request for a change must be made, in writing, to the Regional Director, Office of Motor Carriers, for the FHWA Region in which the carrier maintains its principal place of business, and must include a written description of corrective actions taken and other documentation that may be relied upon as a basis for the requested change to the proposed rating.

(c) The final determination on the request for change will be based upon the documentation submitted and any additional investigation deemed necessary.

(d) The filing of a request for change to a proposed rating under this section does not stay the 45-day period established in § 385.11(d), after which a proposed safety rating becomes final. If the motor carrier has submitted evidence that corrective actions have been taken pursuant to this section and a final determination cannot be made within the 45-day period, the period before the proposed safety rating becomes effective may be extended for up to 10 days at the discretion of the Regional Director.

(e) If it is determined that the motor carrier has taken the corrective actions required and that its operations currently meet the safety standard and factors specified in § 385.9, the motor carrier will be provided with written notification that the proposed rating will not be assigned, or, if already assigned, rescinded.

(f) If it is determined that the motor carrier has not taken all the corrective actions required or that its operations still fail to meet the safety standards and factors specified in § § 385.5 and 385.7, the motor carrier shall be provided with written notification that its request has been denied and that the proposed safety rating will become final pursuant to § 385.11(d), or that a safety rating currently in effect will not be changed.

(g) Any motor carrier whose request for change is denied pursuant to paragraph (f) of this section may petition for administrative review pursuant to § 385.15 within 45 days of the denial of the request for rating change. If the proposed rating has become final, it shall remain in effect during the period of any administrative review unless stayed by the reviewing official.

8. Section 385.19 is revised to read as follows:

§ 385.19 Safety fitness information.

(a) Final ratings will be made available to other Federal and State agencies in writing, telephonically or by remote computer access.

(b) The final safety rating assigned to a motor carrier will be made available to the public upon request. Any person requesting the assigned rating of a motor carrier shall provide the FHWA with the motor carrier's name, principal office address, and, if known, the DOT number or the ICC docket number, if any.

(c) Requests shall be addressed to the Office of Motor Carrier Information Management and Analysis, HIA–1, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590.

(d) Oral requests by telephone to (800) 832–5660 will be given an oral response.

9. Part 385 is amended by revising appendix B to read as follows:

Appendix B TO Part 385—Explanation of Safety Rating Process

(a) Section 215 of the Motor Carrier Safety Act of 1984 (49 U.S.C. 31144) directed the Secretary of Transportation to establish a procedure to determine the safety fitness of owners and operators of commercial motor vehicles operating in interstate or foreign commerce. The Secretary, in turn, delegated this responsibility to the Federal Highway Administration (FHWA).

(b) As directed, FHWA promulgated a safety fitness regulation, entitled ''Safety Fitness Procedures,'' which established a procedure to determine the safety fitness of motor carriers through the assignment of safety ratings and established a ''safety fitness standard'' which a motor carrier must meet to obtain a *satisfactory* safety rating.

(c) To meet the safety fitness standard, a motor carrier must demonstrate to the FHWA that it has adequate safety management controls in place which function effectively to ensure acceptable compliance with the applicable safety requirements. A ''safety fitness rating methodology'' (SFRM) was developed by the FHWA, which uses data from compliance reviews (CRs) and roadside inspections to rate motor carriers.

(d) The safety rating process developed by FHWA's Office of Motor Carriers is used to:

1. Evaluate safety fitness and assign one of three safety ratings (*satisfactory, conditional* or *unsatisfactory*) to motor carriers operating in interstate commerce. This process conforms to 49 CFR 385.5, Safety fitness

standard, and § 385.7, Factors to be considered in determining a safety rating.

2. Identify motor carriers needing improvement in their compliance with the Federal Motor Carrier Safety Regulations (FMCSRs) and applicable Hazardous Material Regulations (HMRs). These are carriers rated *unsatisfactory* or *conditional*.

I. Source of Data for Rating Methodology

(a) The FHWA's rating process is built upon the operational tool known as the CR. This tool was developed to assist Federal and State safety specialists in gathering pertinent motor carrier compliance and accident information.

(b) The CR is an in-depth examination of a motor carrier's operations and is used (1) to rate unrated motor carriers, (2) to conduct a follow-up investigation on motor carriers rated *unsatisfactory* or *conditional* as a result of a previous review, (3) to investigate complaints, or (4) in response to a request by a motor carrier to reevaluate its safety rating. Documents such as those contained in driver qualification files, records of duty status, vehicle maintenance records, and other records are thoroughly examined for compliance with the FMCSRs and HMRs. Violations are cited on the CR document. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

II. Converting CR Information Into a Safety Rating

(a) The FHWA gathers information through an in-depth examination of the motor carrier's compliance with identified ''acute'' or ''critical'' regulations of the FMCSRs and HMRs.

(b) Acute regulations are those identified as such where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall safety posture of the motor carrier. An example of an acute regulation is § 383.37(b), allowing, requiring, permitting, or authorizing an employee with more than one Commercial Driver's License (CDL) to operate a commercial motor vehicle. Noncompliance with § 383.37(b) is usually discovered when the motor carrier's driver qualification file reflects that the motor carrier had knowledge of a driver with more than one CDL, and still permitted the driver to operate a commercial motor vehicle. If the motor carrier did not have such knowledge or could not reasonably be expected to have such knowledge, then a violation would not be cited.

(c) Critical regulations are those identified as such where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls. An example of a critical regulation is § 395.3(a)(1), requiring or permitting a driver to drive more than 10 hours.

(d) The list of the acute and critical regulations which are used in determining safety ratings is included at the end of this document.

(e) Noncompliance with acute regulations and patterns of non-compliance with critical regulations are quantitatively linked to inadequate safety management controls and usually higher than average accident rates. The FHWA has used noncompliance with acute regulations and patterns of noncompliance with critical regulations since 1989 to determine motor carriers' adherence to the Safety fitness standard in § 385.5.

(f) The regulatory factors, evaluated on the basis of the adequacy of the carrier's safety management controls, are (1) Parts 387 and 390; (2) Parts 382, 383 and 391; (3) Parts 392 and 395; (4) Parts 393 and 396 when there are less than three vehicle inspections in the last 12 months to evaluate; and (5) Parts 397, 171, 177 and 180.

(g) For each instance of noncompliance with an acute regulation or each pattern of noncompliance with a critical regulation during the CR, one point will be assessed. A pattern is more than one violation. When a number of documents are reviewed, the number of violations required to meet a pattern is equal to at least 10 percent of those examined.

(h) However, each pattern of noncompliance with a critical regulation relative to Part 395, Hours of Service of Drivers, will be assessed two points.

A. Vehicle Factor

(a) When a total of *three or more inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months prior to the CR or performed at the time of the review,* the Vehicle Factor (Parts 393 and 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute regulations and/or a pattern of noncompliance with critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor rating as follows:

1. If a motor carrier has three or more roadside vehicle inspections in the twelve months prior to the carrier review, or three vehicles inspected at the time of the review, or a combination of the two totaling three or more, and the vehicle OOS rate is 34 percent or greater, the initial factor rating will be *conditional.* The requirements of Part 396, Inspection, Repair, and Maintenance, will be examined during each review. The results of the examination could lower the factor rating to *unsatisfactory* if noncompliance with an acute regulation or a pattern of noncompliance with a critical regulation is discovered. If the examination of the Part 396 requirements reveals no such problems with the systems the motor carrier is required to maintain for compliance, the Vehicle Factor remains *conditional.*

2. If a carrier's vehicle OOS rate is less than percent, the initial factor rating will be *satisfactory.* If noncompliance with an acute regulation or a pattern of noncompliance with a critical regulation is discovered during the examination of Part 396 requirements, the factor rating will be lowered to *conditional.* If the examination of Part 396 requirements discovers no such problems with the systems the motor carrier is required to maintain for compliance, the Vehicle Factor remains *satisfactory.*

(b) Nearly two million vehicle inspections occur on the roadside each year. This vehicle inspection information is retained in the MCMIS and is integral to evaluating motor carriers' ability to successfully maintain their vehicles, thus preventing them from being placed OOS during roadside inspections. Since many of the roadside inspections are targeted to visibly defective vehicles and since there are a limited number of inspections for many motor carriers, the use of that data is limited. Each CR will continue to have the requirements of Part 396, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

B. Accident Factor

(a) In addition to the five regulatory rating factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate which the carrier has experienced during the past 12 months. *Recordable* accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which results in a fatality; bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; one or more motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) Recordable accidents per million miles were computed for each CR performed in Fiscal Years 1994,1995 and 1996. The national average for all carriers rated was 0.747, and .839 for carriers operating entirely within the 100 air mile radius.

(c) Experience has shown that urban carriers, those motor carriers operating primarily within a radius of less than 100 air miles (normally in urban areas) have a higher exposure to accident situations because of their environment and normally have higher accident rates.

(d) The recordable accident rate will be used to rate Factor 6, Accident. It will be used only when a motor carrier incurs two or more recordable accidents occurred within the 12 months prior to the CR. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable accident rate greater than 1.7 will receive an *unsatisfactory* rating for the accident factor. All other carriers with a recordable accident rate greater than 1.5 will receive an *unsatisfactory* factor rating. The rates are a result of roughly doubling the national average accident rate for each type of carrier rated in Fiscal Years 1994, 1995 and 1996.

(e) The FHWA will continue to consider preventability when a motor carrier contests a rating by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: ''If a driver, who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.''

C. Factor Ratings

(a) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into five regulatory areas called ''factors.''

(b) The following table shows the five regulatory factors, parts of the FMCSRs and HMRs associated with each factor, and the accident factor. Factor Ratings are determined as follows:

Factors

Factor 1 General=Parts 387 and 390
Factor 2 Driver=Parts 382, 383 and 391
Factor 3 Operational=Parts 392 and 395
Factor 4 Vehicle=Parts 393 and 396
Factor 5 Haz. Mat.=Parts 397, 171, 177 and 180
Factor 6 Accident Factor=Recordable Rate

''Satisfactory''—if the acute and/or critical=0 points
''Conditional''—if the acute and/or critical=1 point
''Unsatisfactory''—if the acute and/or critical=2 or more points

III. Safety Rating

A. Rating Table

(a) The ratings for the six factors are then entered into a rating table which establishes the motor carrier's safety rating.

(b) The FHWA has developed a computerized rating formula for assessing the information obtained from the CR document and is using that formula in assigning a safety rating.

MOTOR CARRIER SAFETY RATING TABLE

Factor ratings		Overall safety rating
Unsatisfactory	Conditional	
0	2 or less.	SATISFACTORY.
0	more than 2.	CONDITIONAL.
0	2 or less.	CONDITIONAL.
1	more than 2.	UNSATISFACTORY.
2 or more.	0 or more.	UNSATISFACTORY.

B. Proposed Safety Rating

(a) The proposed safety rating will appear on the CR. The following appropriate information will appear after the last entry on the CR, MCS–151, Part B.

''Your proposed safety rating is SATISFACTORY.''

Your proposed safety rating is CONDITIONAL.'' The proposed rating will become the final rating 45 after you receive this notice.

OR

''Your proposed safety rating is UNSATISFACTORY.'' The safety rating will become the final safety rating 45 days after you receive this notice.

(b) Proposed safety ratings of *conditional* or *unsatisfactory* will list the deficiencies discovered during the CR for which corrective actions must be taken.

(c) Proposed *unsatisfactory* safety ratings will indicate that, if the *unsatisfactory* rating becomes final, the motor carrier will be subject to the provision of § 385.13, which prohibits motor carriers rated *unsatisfactory* from transporting hazardous materials requiring placarding or 15 passengers or more including the driver.

IV. Assignment of Final Rating/Motor Carrier Notification

When the official rating is determined in Washington, D.C., the FHWA notifies the motor carrier in writing of its safety rating as prescribed in § 385.11. A proposed *conditional* safety rating (which is an improvement of an existing *unsatisfactory* rating) becomes effective as soon as the official safety rating from Washington, D.C. is issued, and the carrier may also avail itself of relief under the § 385.15, Administrative Review and § 385.17, Change to safety rating based on corrective actions.

V. Motor Carrier Rights to a Change in the Safety Rating

Under §§ 385.15 and 385.17, motor carriers have the right to petition for a review of their ratings *if there are factual or procedural disputes,* and to request another review after corrective actions have been taken. They are the procedural avenues a motor carrier which believes its safety rating to be in error may exercise, and the means to request another review after corrective action has been taken.

VI. Conclusion

(a) The FHWA believes this ''safety fitness rating methodology'' is a reasonable approach for assigning a safety rating which best describes the current safety fitness posture of a motor carrier as required by the safety fitness regulations (§ 385.9). This methodology has the capability to incorporate regulatory changes as they occur.

(b) Improved compliance with the regulations leads to an improved rating, which in turn increases safety. This increased safety is our regulatory goal.

VII. List of Acute and Critical Regulations

§ 382.115(c) Failing to implement an alcohol and/or controlled substance testing program. (acute)
§ 382.201 Using a driver who has an alcohol concentration of 0.04 or greater. (acute)
§ 382.211 Using a driver who has refused to submit to an alcohol controlled substances test required under Part 382. (acute)
§ 382.213(b) Using a driver who has used a controlled substance. (acute)
§ 382.215 Using a driver who has tested positive for a controlled substance. (acute)
§ 382.301(a) Using a driver before the motor carrier has received negative pre-employment controlled substance test results. (critical)
§ 382.303(a) Failing to conduct post accident testing on driver for alcohol and/or controlled substances. (critical)
§ 382.305 Failing to implement a random controlled substances and/or an alcohol testing program. (acute)
§ 382.305(b)(1) Failing to conduct random alcohol testing at an annual rate of not less than 25 percent of the average number of driver positions. (critical)
§ 382.305(b)(2) Failing to conduct random controlled substances testing at an annual rate of not less than 50 percent of the average number of driver positions. (critical)
§ 382.309(a) Using a driver who has not undergone a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02. (acute)
§ 382.309(b) Using a driver who has not undergone a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances. (acute)
§ 382.503 Driver performing safety sensitive function, after engaging in conduct prohibited by Subpart B, without being evaluated by substance abuse professional, as required by § 382.605. (critical)
§ 382.505(a) Using a driver within 24 hours after being found to have an alcohol concentration of 0.02 or greater but less than 0.04. (acute)
§ 382.605(c)(1) Using a driver who has not undergone a return-to-duty alcohol test with a result indicating an alcohol concentration of less than .02 or with verified negative test result, after engaging in conduct prohibited by Part 382 Subpart B. (acute)
§ 382.605(c)(2)(ii) Failing to subject a driver who has been identified as needing assistance to at least six unannounced follow-up alcohol and controlled substance tests in the first 12 months following the driver's return to duty. (critical)
§ 383.23(a) Operating a commercial motor vehicle without a valid commercial driver's license. (critical)
§ 383.37(a) Allowing, requiring, permitting, or authorizing an employee with a Commercial Driver's License which is suspended, revoked, or canceled by a state or who is disqualified to operate a commercial motor vehicle. (acute)
§ 383.37(b) Allowing, requiring, permitting, or authorizing an employee with more than one Commercial Driver's License to operate a commercial motor vehicle. (acute)
§ 383.51(a) Allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle. (acute)
§ 387.7(a) Operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage. (acute)
§ 387.7(d) Failing to maintain at principal place of business required proof of financial responsibility. (critical)
§ 387.31(a) Operating a passenger carrying vehicle without having in effect the required minimum levels of financial responsibility. (acute)
§ 387.31(d) Failing to maintain at principal place of business required proof of financial responsibility for passenger vehicles. (critical)
§ 390.15(b)(2) Failing to maintain copies of all accident reports required by State or

other governmental entities or insurers. (critical)
§ 390.35 Making, or causing to make fraudulent or intentionally false statements or records and/or reproducing fraudulent records. (acute)
§ 391.11(a)/391.95 Using an unqualified driver, a driver who has tested positive for controlled substances, or refused to be tested as required. (acute)
§ 391.11(b)(6) Using a physically unqualified driver. (acute)
§ 391.15(a) Using a disqualified driver. (acute)
§ 391.45(a) Using a driver not medically examined and certified. (critical)
§ 391.45(b) Using a driver not medically examined and certified each 24 months. (critical)
§ 391.51(a) Failing to maintain driver qualification file on each driver employed. (critical)
§ 391.51(b)(1) Failing to maintain medical examiner's certificate in driver's qualification file. (critical)
§ 391.51(c)(1) Failing to maintain medical examiner's certificate in driver's qualification file. (critical)
§ 391.51(c)(3) Failing to maintain inquiries into driver's driving record in driver's qualification file. (critical)
§ 391.51(d)(1) Failing to maintain medical examiner's certificate in driver's qualification file. (critical)
§ 391.87(f)(5) Failing to retain in the driver's qualification file test finding, either ''Negative'' and, if ''Positive'', the controlled substances identified. (critical)
§ 391.93(a) Failing to implement a controlled substances testing program. (acute)
§ 391.99(a) Failing to require a driver to be tested for the use of controlled substances, upon reasonable cause. (acute)
§ 391.103(a) Failing to require a driver-applicant whom the motor carrier intends to hire or use to be tested for the use of controlled substances as a pre-qualification condition. (critical)
§ 391.109(a) Failing to conduct controlled substance testing at a 50% annualized rate. (critical)
§ 391.115(c) Failing to ensure post-accident controlled substances testing is conducted and conforms with 49 CFR Part 40. (critical)
§ 392.2 Operating a motor vehicle not in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. (critical)
§ 392.4(b) Requiring or permitting a driver to drive while under the influence of, or in possession of, a narcotic drug, amphetamine, or any other substance capable of rendering the driver incapable of safely operating a motor vehicle. (acute)
§ 392.5(b)(1) Requiring or permitting a driver to drive a motor vehicle while under the influence of, or in possession of, an intoxicating beverage. (acute)
§ 392.5(b)(2) Requiring or permitting a driver who has consumed an intoxicating beverage within 4 hours to operate a motor vehicle. (acute)
§ 392.6 Scheduling a run which would necessitate the vehicle being operated at speeds in excess of those prescribed. (critical)
§ 392.9(a)(1) Requiring or permitting a driver to drive without the vehicle's cargo being properly distributed and adequately secured. (critical)
§ 395.1(i)(1)(i) Requiring or permitting a driver to drive more than 15 hours. (Driving in Alaska.) (critical)
§ 395.1(i)(1)(ii) Requiring or permitting a driver to drive after having been on duty 20 hours. (Driving in Alaska.) (critical)
§ 395.1(i)(1)(iii) Requiring or permitting driver to drive after having been on duty more than 70 hours in 7 consecutive days. (Driving in Alaska.) (critical)
§ 395.1(i)(1)(iv) Requiring or permitting driver to drive after having been § on duty more than 80 hours in 8 consecutive days. (Driving in Alaska.) (critical)
§ 395.3(a)(1) Requiring or permitting driver to drive more than 10 hours. (critical)
§ 395.3(a)(2) Requiring or permitting driver to drive after having been on duty 15 hours. (critical)
§ 395.3(b) Requiring or permitting driver to drive after having been on duty more than 60 hours in 7 consecutive days. (critical)
§ 395.3(b) Requiring or permitting driver to drive after having been on duty more than 70 hours in 8 consecutive days. (critical)
§ 395.8(a) Failing to require driver to make a record of duty status. (critical)
§ 395.8(e) False reports of records of duty status. (critical)
§ 395.8(i) Failing to require driver to forward within 13 days of completion, the original of the record of duty status. (critical)
§ 395.8(k)(1) Failing to preserve driver's record of duty status for 6 months. (critical)
§ 395.8(k)(1) Failing to preserve driver's records of duty status supporting documents for 6 months. (critical)
§ 396.3(b) Failing to keep minimum records of inspection and vehicle maintenance. (critical)
§ 396.9(c)(2) Requiring or permitting the operation of a motor vehicle declared ''out-of-service'' before repairs were made. (acute)
§ 396.11(a) Failing to require driver to prepare driver vehicle inspection report. (critical)
§ 396.11(c) Failing to correct Out-of-Service defects listed by driver in a driver vehicle inspection report. (acute)
§ 396.17(a) Using a commercial motor vehicle not periodically inspected. (critical)
§ 396.17(g) Failing to promptly repair parts and accessories not meeting minimum periodic inspection standards. (acute)
§ 397.5(a) Failing to ensure a motor vehicle containing Class A or B explosives, (Class 1.1, 1.2, or 1.3) is attended at all times by its driver or a qualified representative. (acute)
§ 397.7(a)(1) Parking a motor vehicle containing Class A or B explosives (1.1, 1.2, 1.3) within 5 feet of traveled portion of highway. (critical)
§ 397.7(b) Parking a motor vehicle containing hazardous material(s) within 5 feet of traveled portion of highway or street. (critical)
§ 397.13(a) Permitting a person to smoke or carry a lighted cigarette, cigar or pipe within 25 feet of a motor vehicle containing explosives, oxidizing materials, or flammable materials. (critical)
§ 397.19(a) Failing to furnish driver of motor vehicle transporting Class A or B explosives (Class 1.1, 1.2, 1.3) with a copy of the rules of Part 397 and/or emergency response instructions. (critical)
§ 397.67(d) Requiring or permitting the operation of a motor vehicle containing Division 1.1, 1.2, or 1.3 (explosive) material that is not accompanied by a written route plan. (critical)
§ 171.15 Carrier failing to give immediate telephone notice of an incident involving hazardous materials. (critical)
§ 171.16 Carrier failing to make a written report of an incident involving hazardous materials. (critical)
§ 177.800(c) Failing to instruct a category of employees in hazardous materials regulations. (critical)
§ 177.817(a) Transporting a shipment of hazardous materials not accompanied by a properly prepared shipping paper. (critical)
§ 177.817(e) Failing to maintain proper accessibility of shipping papers. (critical)
§ 177.823(a) Moving a transport vehicle containing hazardous material that is not properly marked or placarded. (critical)
§ 177.841(e) Transporting a package bearing a poison label in the same transport vehicle with material marked or known to be foodstuff, feed, or any edible material intended for consumption by humans or animals. (acute)
§ 180.407(a) Transporting a shipment of hazardous material in cargo tank that has not been inspected or retested in accordance with § 180.407. (critical)
§ 180.407(c) Failing to periodically test and inspect a cargo tank. (critical)
§ 180.415 Failing to mark a cargo tank which passed an inspection or test required by § 180.407. (critical)
§ 180.417(a)(1) Failing to retain cargo tank manufacturer's data report certificate and related papers, as required. (critical)
§ 180.417(a)(2) Failing to retain copies of cargo tank manufacturer's certificate and related papers (or alternative report) as required. (critical)

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